**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 128 of 2012**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**ELISHA MAMBONGA WANYAMA.....APPELLANT**

***(Appeal from a Judgment of B.M. Nzakyo, Resident Magistrate Court at Githunguri***

***dated November, 2012 in Criminal No. 1226 of 2010)***

**JUDGMENT**

The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual offences Act No. 3 of 2006. In the alternative he was charged with the offence of indecent act with a female child contrary to section 11 (1) of the same Act. In count II he was charged with the offence of kidnapping from lawful guardianship contrary to Section 255 as read with Section 257 of the Penal Code. In all these offences the victim was one and the same person. The appellant denied the offences but after a full trial he was convicted to the offence of kidnapping contrary to Section 255 as read with Section 257 of the Penal Code and sentenced to 7 years imprisonment.

This appeal arises from the said conviction and sentence. The evidence adduced before the trial magistrate was that the complainant was sent to deliver money to the home of one Ndung'u for milk sales when she found the appellant hiding along the path. The appellant is said to have held the complainant and took her to his home. He prepared food and the two ate and spent the night in that home. It is the complainant's case that the appellant raped her.

On the following day the appellant left for work leaving the complainant with instructions not to go home. On leaving he locked the door from outside. The appellant returned at 7 p.m. and again cooked and the two ate supper. On that night he is said to have raped the complainant once again. On the following day the appellant once again left for work locking the door from outside. The brother of the complainant came and called her from outside, broke the door and rescued her from that house. She identified the appellant as the person who raped her.

The mother's evidence was hearsay because she told the court what her daughter had told her. P.W. 3 produced a P3 form relating to the sexual assault on the complainant and confirmed she had been defiled.

On being put on his defence the appellant denied the offence saying that he was attacked by people, taken to his house on allegations that he had stolen their property and then led to the police station.

Later he was charged with defiling a child, a person she had not known before. He denied committing the offence.

The learned trial magistrate observed that there was no conclusive evidence that the accused person had any sexual intercourse with the complainant. However on count II he said as follows,

**"There is clear and conclusive evidence that the accused person took the complainant in his house and spent with her two nights without the consent of her lawful guardian Mrs. L. W. K. There is clear and reliable evidence that the accused person locked the complainant from outside when he was leaving for work on 3rd and 4th October, 2010……the prosecution had proved beyond any doubt that the accused person kidnapped the complainant kept her in his house without the consent of her lawful guardian. I therefore find the accused person guilty as charged of the offence in count II and proceed to convict him accordingly."**

It is true that the only incriminating evidence is that of P.W. 1 the complainant. The brother who allegedly went and called her from outside was never called as a witness. However, the complainant was subjected to intense cross examination by the appellant and remained firm in her answers in that regard. There is evidence that the two, that is, the complainant and the appellant did not know one another before. This is in the evidence of the complainant and the appellant in his defence. The presence of the complainant in the house of the appellant was not consensual. Indeed, on two occasions she was locked inside the house when the appellant left for work. The learned trial magistrate had the opportunity to see the witness testify before him. He observed the demeanour and believed the complainant. He also assessed the defence of the appellant and concluded it was a mere denial.

On my part, I have made an independent evaluation of the evidence of record. I am persuaded that the appellant committed the offence of kidnapping, that he was adequately identified by the complainant and that the evidence on record justified the conclusions reached by the learned trial magistrate. The offence is serious and on conviction commands a sentence of up to 7 years imprisonment. In the circumstances of this case, the sentence of 7 years imposed by the learned trial magistrate cannot be said to be excessive. Accordingly this appeal is hereby dismissed.

Orders accordingly.

**Dated and delivered at Nairobi this 29th day of November, 2012.**

**A. MBOGHOLI MSAGHA**
**JUDGE**